

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE

CAP/PL/CLK

00-2123

Plaintiff,

VS.

SUPERINTENDENT DASCHIEL ET AL,

Defendants.

U.S. DISTRICT JUDGE  
MAGISTRATE JUDGE SIGNED

FILED  
HARRISBURG

MAY 31 2001

MARY E. D'ANDREA, CLERK  
Per \_\_\_\_\_  
DEPUTY CLERK

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION  
TO DISMISS THE COMPLAINT AND BRIEF IN SUPPORT

I. COUNTER-STATEMENT OF THE CASE

ON December 7, 2000, this Plaintiff commenced this 42 U.S.C. § 1983 CIVIL RIGHTS Action by filing a complaint.

On December 14, 2000, this Court granted the Plaintiff's motion for leave to proceed in forma pauperis; herein this Court will refer to Plaintiff as "Plaintiff".

On February 1, 2001, this Plaintiff filed an amended complaint.

On March 6, 2001, Defendants, by counsel, filed their "BRIEF IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT". Defendants' "BRIEF IN SUPPORT OF MOTION TO DISMISS" was filed on March 20, 2001.

On April 5, 2001, the Plaintiff moved this Court for an enlargement of time until May 20, 2001, in which to reply to Defendants' "BRIEF IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT". On April 16, 2001, the Court granted Plaintiff's motion until May 29, 2001, in which to reply to Defendants' "BRIEF IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT".

Plaintiff now files his Brief in opposition to Defendants Motion To Dismiss The Complaint and Brief in support, herein in this case, avers, deposes

II. COUNTER-STATEMENT OF THE FACTS

The Complaint alleges that from September 12, 2000 until October 2, 2000, Defendants officers Valente, Zimmerman, Taylor, Novak, New and Swift would open & refuse to close the windows in the RHU because of a fellow inmate talking too loud when it was cold outside, the direct result of such Defendants' acts, actions & conduct, Plaintiff was really cold and uncomfortable and would shiver most of the day and night when he was awake during the referred to time period & such also put this Plaintiff in danger of catching pneumonia due to the cold air coming thru the open windows. Plaintiff was placed this Plaintiff under imminent danger of serious physical injury; that, the Defendants knew and were fully aware that the above actions & conduct caused this Plaintiff to become really cold, uncomfortable, as this Plaintiff told them such more than a week ago, yet they did such & continued to do such deliberately & maliciously, showing deliberate indifference to this Plaintiff's physical health, safety & comfortableness & his rights not to be subjected to extreme temperatures; that, Defendant Officer Valente did this several times during the above-time period because he doesn't like this Plaintiff; that, this Plaintiff had to sleep as stated above, due to the behavior of other inmates; that, Defendant Dragovich was personally aware of the conduct of the other Defendants, but failed to correct & remedy such conduct, he had the authority to do so, and that, Defendants had legitimate reason(s) and/or need(s) to open the RHU windows during a above-stated time periods. The Amended Complaint avers, deposes that, when Plaintiff complained to Defendant Superintendent,

about the acts, actions & conduct of Defendants Valentine, Zimmerman, Taylor, Novak, Ney & Suff, in opening & refusing to close the windows in the RHU, when it was really cold & Defendant Dragovich wrote back to Plaintiff & began

him the following:

"You have a lot of nerve complaining about your poor behavior and constant abuse of our staff when you can start acting like a human being, we can talk. Right now your credibility is all." ("quote/ending")

That, the above-reply letter to Plaintiff is undated September 2000, and that, the above-response of Defendant Superintendent Dragovich amounts to illegal Retaliation for Plaintiff's behavior for Plaintiff had already been punished for by the Hearing Board which shows such Defendant's unwillingness to remedy the conduct of Defendants Valentine, Zimmerman, Taylor, Novak, Ney & Suff. further shows Defendant Dragovich's unwillingness to follow Plaintiff's rights & the Law under the Eighth Amendment of the United States Constitution.

Constitution.

Furthermore, the Complaint herein the Civil Rights was filed on December 7, 2000, DC-ADM #804 of July 20, 1994, is the Pa. Dept. of Corrections Administrative Directive which is applicable hereto this case the DC-ADM #804 of January 1, 2001, & that DC-ADM #804 Administrative Directive of July 20, 1994 had no provision therein such directive states that an inmate may appeal the rejection of a grievance by the Grievance Coordinator to the Superintendent that this is the reason why this plaintiff did appeal the Grievance Coordinator's rejection on September 27, 2000, Grievance about the herein, opening the RHU windows to Defendant Superintendent

Also, the new January 1, 2001, DC-ADM#804-VI-C-2 only provides for an appeal to the Facility Manager (superintendent) of the Review Decision on the Grievance and does not provide for appeal of the rejection of grievance to the Superintendent.

Furthermore, the Grievance Coordinator violated DC-ADM#804-VI-C-2 of 1994, when he rejected this Plaintiff's Grievance of September 27, 2000, because, under DC-ADM#804-VI-A-5, of 1994, this Plaintiff was permitted to file a grievance based on different events, when it was necessary to combine the issues to support the claim, as the case, herein, with this Plaintiff's September 27, 2000, Grievance, and that, the Plaintiff did not resubmit such September 27, 2000, Grievance, because, according to DC-ADM VI-B-2, if the grievance had to be submitted 15 calendar days of the date of the incident being grieved and by the time this had submitted <sup>got</sup> September 27, 2000, Grievance and he had received the rejection form letter back from the Grievance Coordinator, the 15 day filing period for such Grievance had already lapsed and it was thus too late to resubmit such Grievance then then. Further, by improperly rejecting this Plaintiff's <sup>Grievance</sup> submitted September 27, 2000, the Grievance Coordinator rendered the Administrative Review under DC-ADM#804 of July 20, 1994, unavailable.

Plaintiff

Furthermore, although this Plaintiff could not resubmit his improperly rejected September 27, 2000, Grievance, he had written & complained to Defendant Superintendent Dragovich & to Secretary of Corrections Martin Hurn, on September 25, 2000, about the same incident.

for he has filed suit for herein this instant, Defendants Dragovich, Valentino, Zimmerman, Naratty and Swift are the Superintendent and/or up at the State Correctional Institution At Camp Hill, which is where complaint arose from.

### III. ARGUMENTS

A. 42 U.S.C. § 1997e(a), AS AMENDED BY THE PLRA, IS UNCONSTITUTIONAL, AS IT IMPROPERLY INFRINGES UPON AND VIOLATES THE DECISIONS OF THE UNITED STATES SUPREME COURT WHICH LIKE THE UNITED STATES CONSTITUTION ITSELF, IS THE SUPREME LAW OF THE LAND.

Plaintiff avers & submits that, 42 U.S.C. § 1997e(a), as Amended By the PLRA, IS unconstitutional as it, Infringes Upon and Violates The Decisions Of The United States Supreme Court, Which Like the United States Constitution Itself, IS The Supreme Law of The Land. In particular, U.S.C. § 1997e(a), violates the U.S. Supreme Court decisions *Patsy v. Board Of Regents OF THE STATE OF Florida*, 457 U.S. 102 S.Ct. 2557 (1982) and in *Monks v. Rape*, 365 U.S. 183, 81 S.Ct. 473 (1961), and their progeny which hold, State Prisoner does not have to exhaust his prison Administratve Remedies before filing a 42 U.S.C. Civil Rights Action in Federal Court & given that U.S. Supreme Court decisions are, like the U.S. Constitution Itself, the Supreme Law of the Land, Congress exceeds legislative authority in enacting 42 U.S.C. § 1997e(a), IS unconstitutional null & void.

B- 42 U.S.C. § 1997b(b), AS AMENDED BY THE PLRA, IS UNCONSTITUTIONAL AS IT IMPREMISSIBLY SINGLES OUT AND TREATS PRISONERS DIFFERENTLY THAN OTHERS AND THUS DENIES PRISONERS EQUAL PROTECTION / TREATMENT OF THE LAW UNDER THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION

Plaintiff's are areas § argues that, 42 U.S.C. AS Amended By THE PLRA, IS UNCONSTITUTIONAL AS IT IMPREMISSIBLY SINGLES OUT AND TREATS PRISONERS DIFFERENTLY THAN OTHERS AND THUS DENIES PRISONERS EQUAL PROTECTION / TREATMENT OF THE LAW UNDER THE EIGHTH AND Fourteenth Amendments of the U.S. Constitution, such does "not" require non-prisoners to exhaust available administrative Remedies before suit under 42 U.S.C. § 1983, but requires prisoners to do so and prisoners have the same rights as non-prisoners have & therefore, 42 U.S.C. is unfair, unjust, discriminatory & unconstitutional & IS NULL & VOID.

C. PLAINTIFF'S 42 U.S.C. § 1983 CIVIL RIGHTS COMPLAINT, HEREIN THIS CASE, SHOULD "NOT" BE DISMISSED FOR PLAINTIFF'S FAILURE TO EXHAUST HIS AVAILABLE ADMINISTRATIVE REMEDIES, HEREIN.

Defendants first claim, that:

- If a grievance is determined to be improper submitted it is retained to the inmate with a form setting forth the reason for rejection. DG-ADM-8045LT-B-1.d. The inmate may appeal

The rejection of his grievance to the Superintendent, DC-ADM #804 is to be noted he may resubmit the grievance, DC-ADM#804. B-1-d.

However, the Plaintiff's, by reply to such, argues that, first of all, this civil action was filed December 7, 2000, with this court, and thus, DC #804 of July 20, 1994, <sup>is</sup> ~~is~~ the Pennsylvania Department of Corrections Administrative Grievance Directive which is applicable hereto to this case, not DC-ADM #804 Administrative Grievance Directive which the Defendants have attached thereto to their Brief in Support of Defendants' Motion to Dismiss. Herein this instant case, as the DC-ADM #804 which the Defendants attached their Brief, was "not" even in effect yet at the time/day which this Plaintiff commenced this action in court, as such DC-ADM #804, <sup>is</sup> ~~is~~ "not" even come into effect until January 1, 2001<sup>2</sup>, and thus, Defendants may "not" rest their base their arguments/claims upon this DC-ADM #804, of January 1, 2001, as new law may only be applied to conduct occurring after date of its enactment, <sup>USC</sup> ~~APA~~, 981 F.2d (11th Cir. 1993) and Henderson v. Lane, 979 F.2d (7th Cir. 1992) (In deciding whether a right was "clearly established" for civil rights immunity purposes, court should focus on state of law at time of alleged right and that the DC-ADM #804, Administrative Grievance

1/ See Defendants' Brief in Support of Motion to Dismiss at

2/ This is the same DC-ADM #804 which Defendants take issue with

3/ See page -1- of the DC-ADM #804, attached to Defendants' Brief in Support of Motion to Dismiss

On July 20, 1994, had no provision therin such direct or stating that an inmate may appeal the rejection of a grievance by the Grievance Coordinator, the Superintendent and that this is the reason why Plaintiff did not appeal the grievance coordinator's rejection. On September 27, 2000, Grievance about the Defendants herein opening the RHU windows to Defendant Superintendent Dzagovich. Also, then on January 12, 2001, DC-ADM VI-C, Administrative Grievance Directive (the very same DC-ADM #804, attached to Defendants' Brief hereto,) provides for an appeal to the Facility Manager (Superintendent) of the initial review decision on the grievance and does "not" provide for an appeal of the rejection of the grievance to the Superintendent, as the Defendants "re" and claim it does and Plaintiff challenges Defendants to show where in DC-ADM #804, VI-C, it specifically states in writing that an inmate may appeal rejection of a grievance by the Grievance Coordinator, the Facility Manager (Superintendent) and second this Plaintiff could not resubmit such September 2000, grievance, because, according to DC-ADM #804 of July 20, 1994, the grievance had to be submitted within 15 calendar days of the date of the incident being grievanced and by the time this Plaintiff had submitted the September 27, 2000, grievance and he had actually received the form letter from back from the SCI-Camp Hill Grievance coordinator, the 15 day filing period for such grievance had already elapsed and it "was" thus too late to file such grievance then.

Defendants next claim that

Jae claims in his complaint that he filed a grievance on September 27, 2000 and that the grievance could not be rejected. The complaint contains no allegations that Jae attempted to obtain review of this decision by appealing it to the Superintendent or that Jae resubmitted his grievance as provided by the grievance policy. 4/

In response to the above, this Plaintiff avers submits that such is true, however, by way of response to such, this Plaintiff avers that, he did not appeal the rejection of his September 27, 2000, grievance to the Superintendent & did resubmit such grievance as provided by the grievance policy, was 4/ because of the same reasons as is set forth here in this Brief at 8.

Lastly, Defendants claim & argue that

Here, Jae has not demonstrated that he has exhausted all available administrative remedies. Although he alleges that he submitted a grievance, which was rejected, he does not demonstrate that he took available steps to correct the problem, either by appealing the grievance coordinator's decision or resubmitting a revised grievance. His failure to exhaust all available administrative remedies required by § 1997(e) of the PLRA bars his action. Accordingly, the complaint should be dismissed.

However, by way of reply to the above, this Plaintiff avers

4/ See Defendants' Brief In Support of Motion to Dismiss S/See Id. at 4. 9

argues that, contrary to what the Defendants' ~~had claimed~~, there was no available steps to correct the problem based upon what he stated & argued, herein, ~~supra~~. Furthermore, this Plaintiff responds ~~that~~ ~~that~~ Plaintiff's Grievance Coordinator violated DC-ADM. #804.VI.K. ADM. #804.VI.A.5, of July 20, 1994, when he rejected the Plaintiff's Grievance of September 27, 2000, because under DC-ADM. #804.VI.A.5, of July 20, 1994, this ~~was~~ was permitted to file a grievance based on different events, when it was necessary to combine the two to support the claim, as was the case, herein, with this Plaintiff's September 27, 2000, Grievance. Furthermore, by improperly rejecting this Plaintiff's properly submitted September 2000, Grievance, the Grievance Coordinator rendered administrative remedies under DC-ADM. #804.VI.A.5, of July 20, 1994, unavailable to this inmate Plaintiff and he could ~~not~~ <sup>not</sup> exhaust such. Plaintiff only has to exhaust the prison's administrative remedies which are available to him. See Camp Brennan, 219 F.3d 279 (3d Cir. 2000), and there are no available <sup>by filing a grievance</sup> remedies herein for him to exhaust as when he attempted to comply with and file his available administrative remedies under DC-ADM. #804.VI.A.5, of July 20, 1994, the SCI-Camp Hill Grievance Coordinator illegally violated DC-ADM. #804.VI.A.5, of July 20, 1994, to allow this Plaintiff to do so, thereby rendering Plaintiff's administrative remedies under DC-ADM. #804.VI.A.5, of July 20, 1994, unavailable to this Plaintiff, the no fault of this Plaintiff, that there was no provision under DC-ADM. #804.VI.A.5, of July 20, 1994, allowing for this Plaintiff to appeal the Grievance.

rejection of the grievance or September 23, 2000 to the Superintendent, and it was too late to resubmit such grievances as by the time the Plaintiff had subjected such grievance & had ~~initially~~ received the Grievance Coordinators form Rejection, the 15 day allowable time period to file this grievance in had already expired/elapsed.

Furthermore, although this Plaintiff could not file and submit his improperly rejected September 23, 2000 grievance, he had written & complained to Defendant Superintendent Dagovich & to Secretary of Corrections Horn, on September 29, 2000, about the same incident for which he has filed suit for herein this instant and thus he "has" presented the incident and facts surrounding such in the complaint, herein, case, to prison officials, (Defendant Superintendent Dagovich and also to the Secretary of Corrections, the Pennsylvania Department of Corrections) he "has" given these prison officials the ~~full~~ opportunity to address & correct the problem/violations complained about in the complaint, this case, that they would have had if he been able to file a grievance and exhaust his administrative remedies as to such under DC-ADM #804, & thus, he has "not" for ~~full~~ exhausted his administrative remedies, herein, if he is deemed by this Court to have failed to exhaust such, available administrative remedies, herein, than he "has" shown excusable reason such and such remedies "were" rendered unavailable.

to him thru no fault of his own and due to circumstances which were beyond his control, as described herein, supra, at 7-9, and thus, he should not be unfairly & unjustly penalized by having his complaint and this case dismissed for failure to exhaust administrative remedies under DC-ADM #804, ~~for 30 days~~, and 42 U.S.C. § 1997e(a) should not be deemed & held to bar this instant civil rights action.

D. THIS COURT SHOULD NOT DISMISS THIS ACTION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES UNDER DC-ADM #804 AS THE PLAINTIFF CANNOT NOW EXHAUST SUCH REMEDIES AS SUCH ARE NO LONGER AVAILABLE TO HIM NOW.

Although he may be wrong, this Plaintiff believes & therefore avers & submits that this Court grants the Defendants' Motion to Dismiss this Plaintiff's complaint, herein to the case, such dismissal is without prejudice, this Plaintiff could refile the complaint as he had exhausted his administrative remedy under DC-ADM #804, <sup>in full</sup>, however, because the Plaintiff now has no remedies available under DC-ADM #804, due to the facts that it is way beyond the allowable 15 days & time to file such grievance, he would be barred from exhausting his administrative remedies under DC-ADM #804.

DC-ADM #804, and because he is no longer up at SCI - Camp HFII, it would be futile for this Court to dismiss the Complaint for failure to exhaust administrative remedies, without prejudice, and order the plaintiff to go back & exhaust his available prison administrative remedies and then his complaint once he has exhausted it fully, as this plaintiff could "not" do so, he has no administrative remedies available to exhaust under DC-ADM #804.

For the foregoing facts, arguments & lack of authority, Defendants' Motion to Dismiss the Complaint, must, as a matter of law, for fairness and judicial economy, be dismissed with prejudice, by the Court, herein in this instant Civil Rights Action forthwith:

RESPECTFULLY SUBMITTED

(S)

John Richard J  
MR. JOHN RICHARD J.  
#BQ-3219  
SCI-Greene, PA  
175 Progress Dr.  
Clayton, PA 15317

Dated: 24th MAY 2001

Plaintiff and Researcher

DC-804  
PART 1COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS  
P.O. BOX 598  
CAMP HILL, PA. 17001-0598

## OFFICIAL INMATE GRIEVANCE

GRIEVANCE NO. 

TO: GRIEVANCE COORDINATOR <b>MR. Ben C. Livingood</b>	INSTITUTION <b>SCI C</b>	DATE <b>9/27/00</b>
FROM: (Commitment Name & Number) <b>MR. John R. Doe, #BA-3219-</b>	INMATE'S SIGNATURE <b>(S) John R. Doe</b>	
WORK ASSIGNMENT <b>None</b>	QUARTERS ASSIGNMENT <b>RHU D 206 Cell</b>	

## INSTRUCTIONS:

1. Refer to the inmate handbook Page 12 and DC-ADM 804 for information on the inmate grievance system.
2. State your grievance in Block A in a brief and understandable manner.
3. Next, you are required to list in Block B the specific actions you have taken to resolve this matter. Be sure to include the identity of staff members you have contacted.

A. Brief, clear statement of grievance: **THIS GRIEVANCE IS LODGED AGAINST THE RHU LT. RHOADES & BARTONFIELD & THE RHU OFFICERS, IN ALL THREE SHIFTS. ONCE AGAIN, THEY ARE ROBTING MY 1ST, 2ND & 3RD AMENDMENT CONST. RIGHTS AS FOLLOWS: ON 9/20/00, A-10, REFUSED TO PUT MY OUTGOING MAIL & OPENED & READ SUCH MAIL & THEN RETURN IT ME & ON 9/22/00, RHU LT. BARTONFIELD PLEADLY TOOK MY GLOBE CONFISCATED. THIS ALSO VIOLATES DC-ADM 1103, VI, E-2-f. ALSO, FOR THE PAST WEEK, SINCE AROUND 9/13/00, RHU OFFICERS HAVE BEEN OPENING THE WINDOWS IN THE RHU & RHU INMATES GET DROWNED. IT IS COLD OUT & I HAVE TO SUFFER & VIOLATION OF THE 4TH AMEND. ALSO, ON 9/23/00, TWO STAFF LEGALLY BURNED BOOKS BECAUSE OTHER INMATES WERE MAKING OUT THE FRONT HOLE OF BURNING TO BE BURNED. THE BURNED BOOKS OF THE OTHER INMATES WERE BURNED. RHU LT. RHOADES STOPPPLY DENIED ME EQUAL PROTECTION OF THE LAW. IN MEALED TOWEL, TOWEL & BED LINEN & SUCH OF THE RHU OFFICERS, REFUSED TO ASSIST ME. THIS GRIEVANCE IS FOR ALL OF SUCH.**

## B. Actions taken and staff you have contacted before submitting this grievance:

**I TRIED TO INFORMALLY RESOLVE THE ABOVE MATTERS BY ATTEMPTING TO VERNALLY DISCUSS SUCH WITH RHU LT. BARTONFIELD ON 9/26/00, RHU LT. RHOADES ON 9/24/00, BUT TO NO AVAIL. ON 9/23/00, I DISCUSSED THESE MATTERS WITH RHU LT. LADY ON 9/26/00, ATTEMPTED TO SEE MR. SPINK ABOUT SUCH, BUT HE LEFT THE BLOCK WITH ALL SE**

Your grievance has been received and will be processed in accordance with DC-ADM 804.

Signature of Grievance Coordinator

Date

**Plaintiff's Exhibit - A -**

SCE-CAMP/HPII

SEP 26 2000

DC Number Name Institution  
FmBQ 3219 Joe, John R. (RHU/Bloc-cell) Referred

Superintendent Dragovich, SFC Plaintiff  
I am writing on this date I am getting sick & tired of getting  
by your officers teens for things I have a right to.  
Library books ready and being made to suffer  
by your officers opening up & refusing to close them  
in the RHU because of a few a school teenagers  
Want to run their own mouths & is up the RHU  
is doing nothing and yet I legally denied a library  
because your officers burn the whole entire front hall  
B1 Pier for the Library Books on Saturday, September  
2000, because they heard a few teenagers  
B103, B104, B107 & B108 talking to said and your  
for the same reason ~~you~~ will open up all the windows  
on RHU for when it is really cold outside as it has  
the last several days & leave such open, and if  
I see this you can order the RHU officers here  
touch the RHU windows until less on RHU to make  
them to open or close the windows directly in front  
cell & then they must do so, or if the alternative I  
sue your RHU officers for \$5,000.00 Compensatory  
\$25,000.00 Punitive Damages in Court for CRU's  
unusual punishment and deliberate indifference to my  
well being/health on also ~~you~~ sue you, SFC  
Conspiracy along with your officers. Also on  
at my 3rd day PRC Review where Deputy Superintendent  
ordered that I be given my legal materials  
and a copy paper that I gave to the PRC here then on the  
same date, however RHU property officer Rub  
has deliberately & maliciously failed to comply with  
Palakovich's orders and give me such legal  
materials here & on Thursday, September 21, 2000 he  
brought that I had in my cell number B104 cell  
his legal materials because he said he had Court P.R.  
due on 9/29/00 and I had court pleadings due on 9/29/00  
And on 9/29/00 RHU property officer Rub  
in minutes after such that he & such exchange is minutes after

CERTIFICATE OF SERVICE

I certify that on 5-25-01, I mailed to the person(s) below, a true & correct carbon copy of the Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss the Complaint And Brief in Support, by U.S. 1st Class Mail, Postage Prepaid & addressee as follows:

MR. Michael L. Harvey, SDAAG,  
Office of the Attorney General of Pennsylvania  
15th Floor - Strawberry Square  
Harrisburg, PA 17120

I certify that on 5-25-01, I gave the original of the above document to prison officials here for mailing to the court.

I certify under penalty of perjury & pursuant to 28 USC § 1746, above, is true & correct.

Dated/Executed on:  
25th MAY 2001  
At Waynesburg, Pennsylvania

(S)

John Richard  
MR. JOHN RICHARD  
#BQ-3219  
SCI-Greene/SMU  
175 Progress Drive  
Waynesburg, PA 15370  
Plaintiff and Plaintiff